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IN THE

Supreme Court of the United States

October Term, 1957

No. 520

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

TYLER GAS SERVICE COMPANY, THE CITY OF TYLER, TEXAS, FEDERAL POWER COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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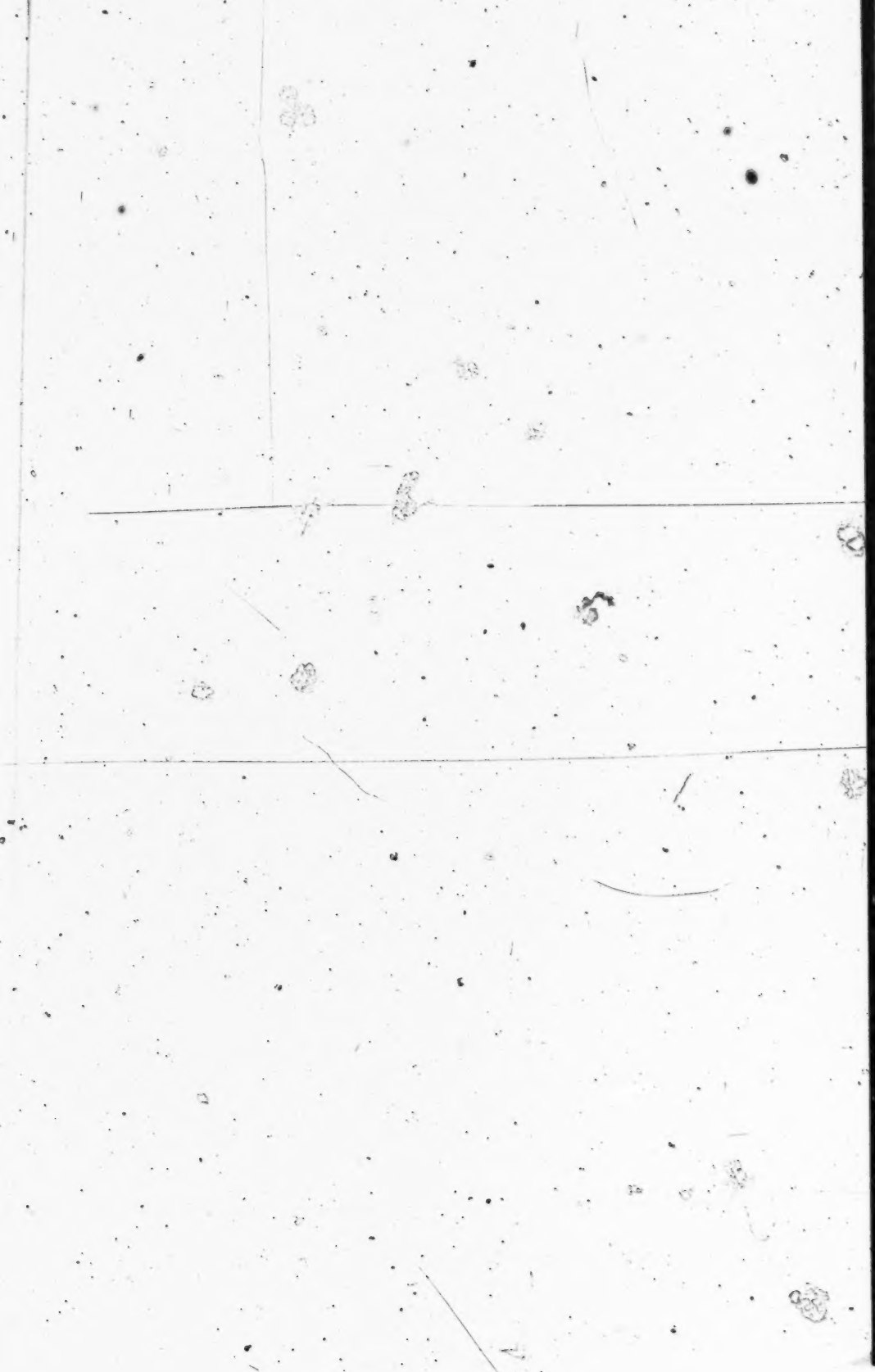

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UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

TYLER GAS SERVICE COMPANY, THE CITY OF TYLER, TEXAS, FEDERAL POWER COMMISSION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 1, 1957 (App. 11),[1] reversing judgment and decision of Respondent Federal Power Commission[2] entered in Dockets G-1142, G-2210, G-9547, and G-10592 against Tyler Gas and City (App. 12), and ordering the Commission to order refunds by Petitioner to Tyler Gas of amounts collected under filed rates at Docket G-2210, and to reject a filing by Petitioner

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[1] The record certified from the Court below will be referred to as R; the Appendix to this Petition as App.

[2] Respondent Federal Power Commission will be referred to hereafter as the Commission; Tyler Gas Service Company will be hereafter referred to as Tyler Gas; City of Tyler, Texas, will be referred to hereafter as City.

of notice of increased rates to Tyler Gas at Docket G-9547 and G-10592, all filed under Section 4(d) of the Natural Gas Act.[3]

OPINION BELOW

The Commission issued an order containing its Opinion and Conclusions (App. 12). The Opinion of the Court (not yet reported) styled *Tyler Gas Service Company, et al* v. *Federal Power Commission, et al,* is contained in the Appendix filed herewith (p. 1 to 9).

JURISDICTION

The judgment of the Court of Appeals was entered August 1, 1957 (App. 11). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Urged as reasons for granting petition

1. May a Court of Appeals, in a review under Section 19(b) of the Natural Gas Act, reject and ignore the plain, clear holdings of a second Court of Appeals affirming a district court judgment and by "construction" effect a reversal and rendition of such judgments to the contrary of their plain, clear adjudication, and thereupon reverse an order of the Federal Power Commission holding such judgments as originally rendered to be res judicata of claims asserted by an applicant to said Commission?

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[3] 52 Stat. 821, c. 556, Act of June 21, 1938, as amended; 15 USC 717-717w; hereafter referred to as the Act.

2. May a Court of Appeals, in a review under Section 19(b) of the Natural Gas Act, revise, contrary to its plain, clear meaning, the final unappealed judgment of a second Court of Appeals in such way as to relieve and release the party cast by the judgment of the second Court of Appeals of and from the onus of such unappealed judgment and then to accord to such party, so released, the protection of a contrary decision of the Supreme Court of the United States in another case rendered subsequently to the final unrevised unappealed judgment of the second Court of Appeals?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act (Act of June 21; 1938, Chapter 556, 52 Stat. 821, as amended, 15 U.S.C. 717, et seq) are set forth in the Appendix filed herewith (p. 50 to 57).

STATEMENT

THE PROCEEDING BEFORE THE FEDERAL POWER COMMISSION

Petitioner, a natural gas company subject to Commission regulation under the Act, filed as a rate schedule the common law contract with Tyler Gas dated November 22, 1940, numbered FPC Rate Schedule No. 42, as amended (R. 2-20). The Commission order permitting the filing (R. 66) permitted only the rate schedules to be filed as effective, adding in Paragraph (C) the caveat that nothing in the order "shall • • • be construed as constituting approval by this Commission of any rate, *provision or condition contained in the contract* • • • ".[4] Supplements No. 4 and 5 dated

May 21 and 29, 1946 (R. 12, 17) amended the rates under circumstances set out in C.A. 1662[5] by the District Court (R. 123, et seq, App. 28 et seq); by the Fifth Circuit (p. 75, FN 3, App. 41); repeated in part from the *same exhibits* by the Court below (App. 2-3). The Commission again (R. 322) approved for filing only the rate schedules, ordering again " • • • *nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate;* • • • " (R. 322-3).

Commission Order 144 (18 CFR 154.1-154.85) promulgated regulations, having force of statutes, strictly dictating the form, composition and content of tariffs, and requiring conversion of contracts, filed as rate schedules, to a tariff form containing two distinct parts: One, a Service Agreement (Section 154.40, App. 60), or retention of those portions of a filed, executed contract as an executed Service Agreement, which would equate the directed content of the Service Agreement (Section 154.85, App. 60).[6] Secondly, a rate schedule defined (Section 154.11, App. 58) as meaning the statement of rate or charge for each classification or sale, and all terms and conditions, etc., affecting such rate or charge, the content of which was strictly and narrowly prescribed (Section 154.38, 154.39, App. 58-60). Section 154.38 (d) (3) made retention of Supplements 4 and 5,

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[4] All emphasis herein is supplied, unless otherwise noted.

[5] *Tyler Gas Service Company and City of Tyler, Texas,* v. *United Gas Pipe Line Company,* C.A. 1662, in the United States District Court for the Eastern District of Texas, Tyler Division, Opinion by District Judge (R. 122-133, App. 27 to 36), affirmed by the United States Court of Appeals for the Fifth Circuit, Opinion reported 217 F.2d 73 (App. 39 to 46), certiorari not sought.

[6] The Regulations promulgated by Order 144 were held validly issued under Sections 4(c) and 16 of the Act, *United Gas Pipe Line Company* v. *Federal Power Commission* (1950, D.C. Cir.) 181 F. 2d 796, cert. den. 340 U.S. 827.

supra, impossible and unlawful. Section 154.21 enjoined unconditional obedience to the effective tariff, i.e., that tariff permitted to be filed as effective under Order 144.

On July 3, 1952, at Docket G-2019, Petitioner filed its Conversion Tariff pursuant to Order 144 (R. 21-33). Simultaneously it filed the Section 154.85 (R. 2) Statement listing those portions (from the original contract and Supplement 3 only), which equated Service Agreement content required by Section 154.40. *No part of Supplements 4 or 5 (R. 12, 17), which the Court below adjudged control rates and service to Tyler Gas, was retained.*

The Conversion Tariff changed both rate form and level applicable to Tyler Gas. It reduced domestic gas rate from 12¢ (R. 13) to 11.2¢ (R. 21), or 6⅔%. It increased the rate for industrial resale gas from 7.2¢ (R. 18) to 7.5¢ (R. 22), or 4.1%. In addition, its definition of "industrial gas",[7] applicable to all industrial rates in the tariff, reclassified a substantial volume of gas sold to Tyler Gas from industrial to domestic, thereby making the higher domestic gas rate applicable to that volume. The parties disagreed on the dollar amount of the changes; the Court declared lack of interest (App. 6, FN 2).

On July 16, 1952, Tyler Gas filed with the Commission a written protest (R. 307-10) to the Conversion Tariff, asserting, inter alia, that it increased rates in violation of the 1946 contracts whose rates were not subject to change during the remainder of the term [to July 25, 1962]; had not been consented or agreed to by Tyler Gas; would breach and abrogate said contract if permitted to become effective; and contained other terms inconsistent with the contract

[7] United's IND schedules are applicable to sales for "Large Volume Industrial Use Only." That term is defined in the General Terms and Conditions to mean "gas delivered * * * to Buyer for resale to those customers of Buyer to whom Buyer sells gas for industrial use only in respective amounts exceeding, or estimated to exceed, 200,000 Mcf per year" (R. 25, 40).

which, if sanctioned, would abrogate the existing contract pro tanto. On July 31, 1952, the Commission ordered the Conversion Tariff filed (R. 311-17), including sheets applicable to Tyler Gas. Thereby, the Commission denied the objections of Tyler Gas, which did not appeal (Section 19(b), Act). *Thereby, the Conversion Tariff replaced and superseded the contract.* Since, no service has been rendered pursuant to said contract.

On June 24, 1953, (Docket G-2210), United filed notice of increased rates to Town Borders, including Tyler Gas (R. 80, 35, 38), which the Commission suspended for the statutory five months (Section 4(e)), and consolidated with Docket G-1142, a Section 5(a) investigation of all Petitioner's rates (R. 83-5) instituted in 1948 (R. 77-8). Tyler Gas and City in sworn applications to intervene admitted that Tyler Gas purchased *solely* under rate schedules of the Conversion Tariff (R. 72, 75). No *Mobile*[8] type objection was raised, but Commission jurisdiction was denied on the claim gas purchased was intrastate gas (R. 73).

On December 8, 1953, Tyler Gas and City sued Petitioner in C.A. 1662 (See FN 5) to enjoin filing of a Section 4(e) motion making increased rates of G-2210 effective; for declaratory judgment that the contract, as amended by Supplements 4 and 5 in 1946, was valid and subsisting; for mandatory injunction to compel specific performance of such contract as amended; and for permanent injunction against any filing pursuant to the Act of rates different from those in the 1946 Supplements 4 and 5 (R. 243-269). The same verified complaint (Section X, R. 257) declared the Conversion Tariff altered the contract rates; was made effective over opposition and protest by Tyler Gas that it

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[8] *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation* (1956) 350 U.S. 332.

violated such contract; that it had not acquiesced or consented to such change; and that payments thereunder were made under protest. Petitioner moved (a) to dismiss for want of jurisdiction, (b) to dismiss for failure to state a claim upon which relief could be granted (accurately condensed by the Fifth Circuit, App. 40-1), and (c) answer on the merits (R. 270-327). On preliminary injunction hearing, Tyler Gas and City advanced the complaint as the application; United, its motions and answer in opposition.

The District Court found against Tyler Gas and City and in favor of Petitioner (R. 122-133, App. 27-36), holding, inter alia, (a) jurisdiction existed; (b) the Conversion Tariff superseded the contract upon Commission denial and rejection of the written protest of Tyler Gas (p. 5-6, infra), upon identical grounds asserted in the complaint, that Tyler Gas failed to appeal under Section 19(b), so that the "contract" had not been in force for some several months; (c) the bill stated no equity because (1) the contract was unenforceable, being wholly inferior to the Act, particularly to the rights, duties, obligations and procedures imposed and conferred by the Act on Petitioner and the Commission, (2) that the contract constituted no impediment to, nor created estoppel against, Petitioner's filing with the Commission, pursuant to Section 4, a schedule of rates to meet the requirement of the Act for just and reasonable rates, and (3) that the filing (Docket G-2210) was not unilateral action by Petitioner in disregard of its contract rates, but was a following of statutory procedure in accordance with the statutory scheme; (d) that in a rate filing pursuant to Section 4, the Commission was amply empowered to give adequate relief; (e) that there was neither contract nor estoppel in favor of City. So deciding, the District Court denied injunction and dismissed the suit on the merits (R. 133-4).

The Fifth Circuit affirmed in a strong opinion (App. 39, 46), holding, inter alia, to grant the relief sought would be in defiance of the Act, and particularly Section 4; and expressly approved the holding that filing of increased rates at Docket G-2210 was not unilateral but lawful, because in accordance with the statutory scheme. Upon failure to seek certiorari from this Court, both judgments and decisions became final in February, 1955 — *one year before Mobile.*

The G-2210 rates, made effective by Section 4(e) motion, applied until superseded by the Section 5(a) rates of Docket G-1142 ordered by Commission Opinion 277 (13 FPC ....., R. 77-102). Opinion 277 approved agreement upon a cost of service and rate structure prepared by the Commission's Staff. Tyler Gas accepted Staff figures, subject to outcome of its appeal in C.A. 1662 then pending in the Fifth Circuit (R. 84, 94-5; Orders (A), (B), (C), (I), (O)(b), R. 97, 98, 99, 101). Rates filed at G-2210 were disallowed (Finding 2, R. 96; Order (A), R. 97); refund was ordered ((D) R. 98), paid to and accepted by Tyler Gas (App. 48, 49).

Service was rendered by Petitioner, paid for by Tyler Gas, solely under applicable rate schedules contained in the Conversion Tariff. Upon the effective date of the Section 5(a), G-1142, Opinion 277 rates, service was had and paid for only by virtue of rate schedules filed pursuant to Commission order and the General Terms and Conditions (R. 39-64), which integrally contained forms of Service Agreement (Conversion Tariff, R. 363, 371, G-1142, First Revised Volume p. 375, 385), imported into the rate schedules. Each of these (R. 366, 374; 378, 387) provided that the gas delivered should be paid for by buyer under the rate schedule (specifically described) "or any effective superseding rate schedules, on file with the Federal Power Com-

mission". The noticed changes occurring after the filing of the Conversion Tariff (the G-1142 rates, G-9547 and G-10592) were covered by and filed pursuant to such language and are consonant with the judgments and decisions of both Courts in C.A. 1662, and the necessary effect thereof.

Opinion 277 rates were superseded by those filed at Docket G-9547 (R. 337-8), and subsequently by those at Docket G-10592 (R. 338).

After this Court's decision in *Mobile, supra,* on February 27, 1956, Tyler Gas and City, seeking escape from the adverse final judgments in C.A. 1662, sought re-litigation through the device of Motion for Refund at Docket G-2210, filed May 15, 1956, (R. 142, et seq) (though full refund ordered by the Commission at G-2210 had been paid, App. 48, 49), and motions to reject the applicable filing at Dockets G-9547 (R. 105) and G-10592 (R. 213). All motions relied upon *Mobile.* Petitioner answered each (G-1142, G-2210, R. 164; G-9547, R. 135, 237; G-10592, R. 221), contending *Mobile* was not applicable and relying upon the Commission order denying protest to the Conversion Tariff and the judgments and decisions in C.A. 1662 as res adjudicata that the contract was superseded by the Conversion Tariff and ineffective; and at law was no impediment or bar to the right, duty, and obligation of Petitioner to file change of rates pursuant to Section 4(d), in order to comply with the Act.

By Opinion 294 (R. 404, App. 12), the Commission sustained Petitioner's position upon the integrity and bar of the judgments and decisions in C.A. 1662, and of its order.

THE JUDGMENT OF THE COURT OF APPEALS

Tyler Gas and City filed a petition for review under Section 19(b) of the Act to set aside the Commission's order (R. 391). The Commission appeared in defense of its

order. Petitioner, upon motion (R. 420), was allowed to intervene in support of Commission's Order (R. 438).

On August 1, 1957, the Court of Appeals in an opinion written by Judge Bastian (JJ. Bazelon and Washington concurring) set aside the Commission's order rejecting the several motions of Tyler Gas and City for refund and for rejection of filings of rate schedules (R. 439). The Court held that *Mobile* was not distinguishable from this cause; and that the judgment of the Fifth Circuit in C.A. 1662 was not res judicata

REASONS FOR GRANTING WRIT

The Court posed two questions: First, whether this case is distinguishable from *Mobile;* secondly, whether the judgment of the Fifth Circuit in C.A. 1662 was res judicata. It ignored the holding and adjudication of the Fifth Circuit, and by "construction", considered, as though originally presented, the issues determined by the Fifth Circuit reaching a decision contrary to the clear holding of that Court. Thereby its decision is in irreconciliable conflict with that which the Fifth Circuit adjudicated.

Having thus by "construction" nullified the holding of the Fifth Circuit, it denied res judicata and declared the case indistinguishable from *Mobile.*

In these conclusions the Court, in effect, without being empowered thereto, exercised a revisory power over the Fifth Circuit decision, appellate in character.

In addition, the decision is squarely in conflict with the long settled policy and declarations by this Court, and other Courts, including the Court below, which forbids resurrection of issues actually interred by judgment, and declares

that the same issues shall not be re-litigated between the same parties, including issues which might have been urged.[9]

In denying res judicata to the Commission order permitting the Conversion Tariff to be filed, it equally conflicts with settled, well considered decisions applying the same legal doctrine to orders of administrative agencies.[10]

The applicable decisions of this Court uniformly declare that where a judgment, however erroneous and however certain its reversal would be upon appeal, is permitted to become final without appeal, such is conclusive between the parties. Petitioner suggests that the decision below is not consonant with, but in denial of, such decisions of this Court, for it has effect to reverse and render the decision of the Fifth Circuit and declares a result claimed to accord with the rule of *Mobile* decided by this Court more than a year after the Fifth Circuit judgment became final, and thereby has effect to release Tyler Gas and City from the onus of an adverse judgment rendered by the Court of their selection and at their instance.

I.

The most sweeping part of the decision is that which holds that the judgment rendered in C.A. 1662 was merely one of dismissal for lack of jurisdiction, and not a determination upon the merits. The Court reasoned that since the

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[9] *Brownell* v. *Chase National Bank, et al* (1956) 352 U.S. 36; *Angel* v. *Bullington* (1947) 330 U.S. 183; *United States* v. *Munsingwear* (1950) 340 U.S. 36; *Woods* v. *Cannaday* (1946) 81 App. D.C. 281, 158 F. 2d. 184; *United States* v. *New York Terminal Warehouse Company* (5 Cir. 1956) 233 F. 2d. 238; *United States ex rel Donner Steel Co. Inc.* v. *I.C.C.* (1925) 56 App. D.C. 44, 8 F. 2d. 905; *Wheat* v. *Texas Land & Mtg. Co.* (5 Cir. 1945) 153 F. 2d. 926, cert. den. 328 U.S. 837; *Crowell* v. *Baker Oil Tools, Inc.* (5 Cir. 1947) 164 F. 2d. 487, cert. den. 333 U.S. 880; *Foster* v. *Wells* (1849, S. Ct. Texas) 4 Tex. 101; *Commonwealth of Massachusetts* v. *Davis* (1942) 168 SW 2d 216, 140 Tex. 398, cert. den. 320 U.S. 210.

[10] *Sunshine Anthracite Coal Co.* v. *Adkins* (1940) 310 U.S. 381; *Otis & Co.* v. *Securities & Exchange Commission* (1949, D.C. Cir.) 176 F. 2d 34, reversed on other grounds 338 U.S. 843; *George H. Lee* v. *Federal Trade Commission* (1940 8 Cir.) 113 F. 2d 583; *United States* v. *Willard Tablet Co.* (1944, 7 Cir.) 141 F. 2d. 141.

Courts in C.A. 1662 held that the Commission was "amply empowered to give adequate relief," such merely declared primary jurisdiction and thus could not be res judicata on the merits of the Commission's later action, though its clear duty obligated it to exonerate such judgments to prevent Tyler Gas and City from asserting claims denied by such Courts constitutionally empowered so to adjudge.

In C.A. 1662 Tyler Gas and City sought (1) to enjoin filing of a motion under Section 4(e) to put increased rates into effect; (2) a declaratory judgment the contract was valid and subsisting; and (3) for mandatory injunction to compel specific performance of the contract and to prevent any filing to the Commission under the Act contrary thereto. These matters were solely addressed to the equity jurisdiction of the Court. The Commission can neither consider nor grant injunctory pleas, nor equitable petitions for specific performance, whether by injunction or otherwise. With deference Petitioner submits that it is sophistry to say that the Fifth Circuit judgment merely was that the Commission alone could decide the issues Tyler Gas posed. The Commission cannot even enforce its decisions, properly made within the sphere of its authority, but must file enforcement proceedings with the proper District Court in accordance with Section 20 of the Act.

The District Court in C.A. 1662 denied a challenge to its jurisdiction, affirmed by the Fifth Circuit, and expressly declared jurisdiction of subject matter and parties (R. 133, App. 37).

The Fifth Circuit in a per curiam opinion denying Petitioner's Motion to Dismiss the appeal for mootness held:

> " • • • we are in no doubt: that it is an appeal from a final judgment *determining the case on the merits* against appellant the correctness of which appellant

has a right to have this court determine; * * * *" (R. 361).

"Correctness" was declared, a determination having no odor of lack of jurisdiction to decide.

Tyler Gas and City by C.A. 1662 asserted contract rights of overriding superiority to statutory procedure under the Act. In determining that there was a want of equity requiring denial of such claims, the District Court in an opinion imported into its judgment as Findings of Fact and Conclusions of Law, affirmed by the Fifth Circuit (R. 133, 122, App. 37, 27), held, inter alia:

1. That Tyler gas protested, did not consent to the contract rate change worked by the Conversion Tariff, did not seek judicial review under Section 19 of the Act (R. 126-7, App. 30) of the Commission order (R. 311), which "allowed" the Conversion Tariff to become effective so that its rates, though a departure from the contracts, were "lawful" rates solely by the Commission order, whereby the contract provisions purporting to fix rates over a long period in the future "and upon which Plaintiffs [Tyler Gas, City] based their claim for equitable relief have not been in effect for a matter of several months" (R. 131, App. 35).

Yet the Court below, while admitting that Order 144 "was not the result of independent action", i.e., agreement between Petitioner, Tyler Gas, or City, and that the Conversion Tariff effected change in rate level and form (R. 441, App. 3), nevertheless reversed and rendered, holding that Tyler Gas had "acquiesced" in the Conversion Tariff and its change in the contract rates (R. 444, App. 6). This is in the teeth of, and without support in, the record. It ignored the sworn pleading of Tyler Gas and City denying

acquiescence (R. 257), and further ignored and wrongfully refused the adjudicated res judicata from denial of the written protest and failure to appeal.

While conceding no "independent action", i.e., agreement, the Court also reversed and rendered the adjudication that the contract had not been in effect for several months prior to C.A. 1662 by adjudging that the Conversion Tariff became "a part of an unchanged contract" and cited *Mobile*. But the *Mobile* holding was based on assent, the Third Circuit, additionally, noting a distinction from *Tyler Gas*, because the contract had already been modified in an adversary proceeding.[11] (215 F. 2d, FN 3 at p. 885). The Court had no power thus involuntarily to revive the contracts the Fifth Circuit had three years before adjudged long dead, then to make for the parties a contract of amendment. Petitioner never so authorized, nor consents.

Tyler Gas had branded approval of the Conversion Tariff as contract abrogation. The Court below thus was not warranted in relying upon *Mobile*, for here there was want of assent to contract modification.

2. "It is abundantly clear the United may not by private contract fix binding long-term future rates with its customers. * * * compliance with the regulation, and deviation from or violation of the contractual provision, by the one contracting party does not give rise

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11 Mobile's petition to review in the Third Circuit alleged that the percentage rates in the contract resulted in payments "at an actual rate of 10.7¢ per Mcf", and that these percentage rates were replaced with the Conversion Tariff "* * * which substituted a flat rate of 10.7¢ per Mcf for gas sold to Mobile for resale to Ideal" (Tr. of R. in the U.S.S. Ct. No. 436, October Term, 1954, p. 49). The Third Circuit (Fn. 16, p. 891) said "There is no contention that the instant contract was changed by the Conversion Order replacing the percentage rate by the fixed rate. The latter, as has been mentioned, was substantially the same as the old percentage rate and inferentially became a part of the unchanged contract." In its brief in this Court, Mobile said (Br. 4) that the Conversion Tariff "provided that sales to Mobile for resale to Ideal would be at a flat rate of 10.7¢ per Mcf. which was *precisely* the amount of return which it had previously received under the pre-existing percentage rate."

to a cause of action in favor of the other, either for money damages (Miss. Power & Light Co. v. Memphis Natural Gas Co. (162 Fed. (2d) 388) or for specific performance (Mich. Consol. Gas Co. v. Panhandle Pipe Line Co., 173 Fed. (2d) 784). (R. 128, 129; App. 32, 33).

"So, despite any contractual provision to the contrary, United is entitled at all times to collect a just and reasonable rate for its gas, and the question of whether any *suggested* rate is just and reasonable — and hence lawful — is for the determination of the Commission. If United may not by contract commit itself to long-term future rates free of regulation by the Commission, then neither may it by contract estop or deprive itself of the opportunity to bring before the Commission for review and determination the question of the lawfulness of such rates. The statute contemplates that a natural-gas company may, under the circumstances there enumerated, initiate proceedings under Section 4 for a determination of the justness and reasonableness of proposed rates" (R. 128-9; App. 33).

Even though the Court below considered this contrary to the later holding of this Court in *Mobile*, such adjudication, affirmed by the Fifth Circuit and *unappealed to this Court*, may not be ignored and denied by the Court below as mere "comments".

3. That United's action in filing increased rates at Docket G-2210 in the face of the claimed contract was not "unilateral", because in accordance with the statutory scheme (R. 130, App. 34).

The Court below in the face of this plain holding, expressly approved by the Fifth Circuit (217 F. 2d 78, App. 39) proclaimed the filings at Dockets G-2210, G-9547, and G-10592 "unilateral". Having destroyed efficacy of that judgment, it declared the filings interdicted by *Mobile*.

4. That the "new rates" of G-2210 became the lawful ones by virtue of the Commission order, so that the contract provision for future rates was superseded. During the time when the contract rates

> " • • • were in fact the lawful ones, they became lawful not simply because the parties had agreed thereto. Such rates received their vitality and breath of life from the fact that the Commission permitted such contract to be filed, and ordered such rates into effect until further notice. By the order which accomplished this result (Plaintiff's Exh. 19) [R. 322] the Commission was careful to provide that such actions should not 'be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate' " (R. 131, App. 35).

If this be "comment", its statement by a court was dispositive of suit claims — ignored by the Court below.

5. The District Court held that since it should not restrain Petitioner from taking the initial step in bringing the matter before the Commission for review, it should not restrain any successive steps, and in respect of the filing held that the Commission was amply empowered to give adequate relief on the proposed rates (R. 130-1, App. 34-5). Its holding negated right or issue requiring consideration of "contract rights".

The Fifth Circuit, affirming the holdings listed, concluded jurisdiction was correctly affirmed; that United "cannot" by private contract "fix binding long-term future contracts". It defined the basic position of Tyler Gas and City as contained in eight Specifications of Error (FN 4, p. 76, App. 43), "which ring the changes on what it claims is the fundamental error of the trial court, attack its holdings that a public utility company may, by the simple expedient of filing a revised schedule with the Federal Power Com-

mission, without a full hearing before and a finding by the Commission that such contract rates are unjust, unreasonable, or unlawful, disregard its solemn contracts fixing maximum rates" (p. 76, App. 43-4), and by its opinion and decision denied these contentions. It reasoned that the District Court was correct, the Tyler Gas and City contentions wrong, because a freeze by contract, as they contended, "would be the result of action in contravention, if not in defiance of, the Natural Gas Act, and in particular Section 4 thereof and of the authority and jurisdiction of the Federal Power Commission" (p. 77, App. 45). It expressly held right the rejection of the prayer for a decree "requiring [Petitioner] to specifically perform the contract sued on, the Act and its proceeding under the Act to the contrary notwithstanding" (p. 78, App. 45). Finally, it declared that the District Court "correctly held that if he could, and should, restrain United from taking any of the preliminary steps provided by statute, he should, as Plaintiffs pray, restrain them altogether from abrogating or modifying the contract rates, and this, as Sections 4(d) and (e) of the Act make plain, the Court cannot do" (p. 78, App. 46).

These holdings, while contrary to the holding of this Court in *Mobile*, became final, without appeal, more than a year before this Court's decision. The Court below was thus not justified in setting aside such judgment and substituting its own.

Furthermore, the dismissal was one with prejudice, so adjudication on the merits.[12] Dismissal for "want or failure of equity" was equally adjudication on merits.[13] So, too,

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[12] Rule 41b FRCP; *Slack* v. *Rich* (1950) 87 App. D.C. 123, 182 F. 2d 706; *Ross* v. *Ickes* (1942) 130 F. 2d 415, 76 App. D.C. 146; *Sardo* v. *McGrath* (1952) 196 F. 2d 20, 90 App. D.C. 195; *Holcomb* v. *Holcomb* (1954) 209 F. 2d. 794, 797, 93 App. D.C. 242; *American National Bank & Trust Co.* v. *U.S.* (1944) 142 F. 2d. 571, 79 App. D.C. 62; *Mooney* v. *Central Motor Lines* (6 Cir. 1955) 222 F. 2d 572.

[13] *Sacks* v. *Stecker* (2 Cir. 1932) 62 F. 2d 65)

dismissal in response to a motion under Rule 12(b) FRCP for failure to state a claim.[14] The Findings and Conclusions are available to define re-litigation, forbidden under the res judicata concept.[15]

The Courts in C.A. 1662 held the contract non-existent and superseded by the Conversion Tariff prepared and filed under compulsion of the Commission's Order 144. The Court below has held that order promulgated valid Regulations pursuant to Sections 4(c) and 16 of the Act. *United Gas Pipe Line Company* v. *Federal Power Commission* (1950) 181 F. 2d. 796, cert. den. 340 U.S. 827, whereby such Regulations have the force and effect of statutes. Service thus was rendered and paid for by Tyler Gas under rate schedules filed pursuant to said Regulations, not by contract. G-2210 filing was decreed valid subject to Commission review.

The Conversion Tariff rate schedules (R. 21, 23) integrated General Terms and Conditions containing Forms of Service Agreements. Thus Article V (R. 366) and Article IV (R. 374) provided:

> "All gas delivered hereunder shall be paid for by Buyer under Seller's rate schedule (schedule described), *or any effective superseding rate schedules on file with the Federal Power Commission.*"

The same provision was contained in the Form of Service Agreements likewise imported into the Revised Sheets filed as ordered by Opinion 277 (R. 378, 387). Service was received by Tyler Gas under these circumstances. The decision of the Courts in C.A. 1662 sanctioned such filings as controlling. Based thereon, the Commission in Opinion

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[14] *Daley* v. *Sears, Roebuck Co.* (1950, D.C.N.D. Ohio) 90 F.S. 562; *Mullen* v. *Fitz Simons & Connell Dredge and Dock Co.* (1948, 7 Cir.) 172 F. 2d 601, cert. den. 337 U.S. 959, Cf. *Wilson, Inc.* v. *F.C.C.* (1948) 83 App. D.C. 176, 170 F. 2d 793, 805.

[15] *Florasynth Laboratories, Inc.* v. *Goldberg* (7 Cir. 1951) 191 F. 2d 877.

294 correctly held that rate changes so effected were properly filed and distinguishable from *Mobile*. The Court below recently held language almost identical with that of such Service Agreements readily distinguishable from *Mobile*, because expressly contemplating future filings so that there was no unilateral change in rates fixed by contract.[16]

Upon consideration of the holdings in C.A. 1662, the Court below was not justified in reversing the Commission holding in Opinion 294 that such filings and changes effected after the Conversion Tariff were properly filed.

II.

Petitioner suggests that the Court of Appeals in the decision below repeated its dismissal of the Fifth Circuit decision expressed in its opinion in *Sierra Pacific Power Company* v. *Federal Power Commission* (1955), 223 F. 2d 605. There the Court said:

> "Cases relied on by the Commission do not sustain its position. *Tyler Gas Service Company* v. *United Gas Pipe Line Company* which the Commission asserts is inconsistent with the Mobile case, expressly withheld any opinion as to the correctness of that decision." (p. 609).

Wanting there, present here, was the judgment roll in C.A. 1662. The record here contains the Bill of Complaint and attached exhibits (R. 243), the motions and answer of Petitioner and exhibits attached (R. 270, et seq), the Opinion of the District Judge (R. 122, App. 27), the judgment of the District Court (R. 133, App. 37), citation of the Fifth Circuit opinion, the judgment of the Fifth Circuit (R. 134, App. 47). An over-all appraisal of the Court's

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[16] *Cincinnati Gas & Electric Company* v. *Federal Power Commission*, decided June 3, 1957, No. 13515, U.S.C.A., D.C. Cir. ... F. 2d ..., not yet published. See *Same* v. *Same*, No. 13557, decided June 20, 1957, by the same Court, ... F. 2d ..., not yet published.

opinion reasonably leads to the conclusion that it was persuaded to adhere to its prior reaction despite the inescapable fact that the judgment roll clearly discloses adjudications wholly consistent with, and requiring, the decision of the Commission in the order reviewed. A party may not be relieved of a final adverse judgment simply because the court of last resort subsequent to the finality of such judgment declared the law to be contrary to that decided. *Mobile* removed the Fifth Circuit decision from the authority of stare decises, but not from the compulsion of res judicata. This Court should take jurisdiction, and so declare.

CONCLUSION

It is accordingly urged that a Writ of Certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

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